
United States
Circuit Court of Appeals
For the Ninth Circuit

THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,
Appellant,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, interveners.
Appellees.

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, intervener,
Appellant,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,
Appellees.

REPLY BRIEF OF APPELLEE

CARL J. HAHN, ADMINISTRATOR OF THE ESTATE OF HARRY M. KING, DECEASED, TO BRIEF OF AMERICAN WATERWORKS AND ELECTRIC COMPANY, A CORPORATION, APPELLANT.

Upon Appeal From the United States District Court for the District of Idaho, Southern District.

JAMES H. WISE
Residence: Twin Falls, Idaho,
Solicitor for Carl J. Hahn, Administrator of Harry M. King.

Filed

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STATEMENT OF CASE

(Note: Figures refer to pages of record.)

On the 6th day of May, 1913, and prior, deceased, Harry M. King, was in the employ of the Great Shoshone & Twin Falls Water Power Company, a public service corporation, engaged in generating, transmitting and distributing electric current in Ada, Elmore, Gooding, Owyhee, Lincoln and Twin Falls Counties, Idaho, and owned, controlled and operated an electrical distribution system throughout the aforesaid counties, and was the owner of a franchise to conduct said business in the aforesaid counties, the property of said company consisting of franchises, wires, poles and electrical apparatuses. On said date, the said deceased, while in the employ of the said company in the construction and repair of its line, under an uninsulated high tension power wire, charged with a dangerous and deadly current of electricity and while said deceased was in the employ of the defendant, under the orders, directions and command of the defendant's foreman, and while said defendant was in the operation and operating said plant, and while said deceased was performing his duties for said company, by reason of the negligence and carelessness of said company, the said deceased was severely shocked, burned and bruised, from which the said Harry M. King, deceased, died on the 6th day of May, 1913, and left surviving him, his widow, Katherine King, and his minor children, Margaret King, age eight years, and Alice King, age six years, and left no other child, or descendants of deceased child (89-90-91-92).

Carl J. Hahn, this appellee, was and now is the administrator of the estate of Harry M. King, deceased (88). On the 29th day of October, 1913, this appellee filed a suit in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Twin Falls against the Great Shoshone & Twin Falls Water Power Company for damages on account of the negligence, and carelessness of said company, which resulted in the death of said Harry M. King, deceased. Thereafter, said suit was moved to the District Court of the United States, District of Idaho, Southern Division. Issue was joined and trial had before a jury on the 23rd day of September, 1914, and verdict returned in favor of this appellee in the sum of \$5,590, together with costs and disbursements in the sum of \$174.35 (92-100).

On November 22, 1914, the Honorable F. S. Dietrich, Judge of the United States District Court, in and for Idaho, appointed William T. Wallace, receiver of the Great Shoshone & Twin Falls Water Power Company, to take charge of the property and assets of said company, and is now and at all times herein mentioned, has remained in charge of said company as receiver (94).

On the 1st day of May, 1910, the said Great Shoshone & Twin Falls Water Power Company issued a series of bonds not exceeding \$10,000,000.00, with interest at five per cent. payable semi-annually on the first day of May and November of each and every year. On November 2, 1914, the said defendant, Great Shoshone & Twin Falls Water Power Company, defaulted in the payment of interest on said mortgage and bond to the Equitable Trust

Company of New York, but permitted said company to continue in operation and possession of the property by and through a receiver (95).

On April 14, 1915, the Equitable Trust Company of New York started a foreclosure proceedings on the bond issue heretofore mentioned and set out (7 and 78). This appellee was made one of the parties defendant in said cause of action, and filed his answer May 15, 1915 (88 to 101, inclusive).

Said cause of action was tried in the United States District Court of Idaho, and decree of foreclosure entered on the 6th day of December, 1915 (189-210). The property was sold January 8, 1916 (214-215). In the decree of foreclosure the claim of Carl J. Hahn, administrator of the estate of Harry M. King, deceased, appellee was allowed as a preference right for the sum of \$6,225.15 (192).

The court ordered a special master appointed in the foreclosure suit to pay the full claim of said Carl J. Hahn (224-227) for \$6,225.15 and interest (242).

On October 27, 1915, at the hearing of the court on the foreclosure proceedings, the American Water Works Company was present in court by its attorney, Pasco B. Carter, and had full knowledge and notice of the proceedings that were taking place (229-238-247-301-315).

H. Hobart Porter is the president of the American Water Works and Electric Company; also president of the Great Shoshone & Twin Falls Water Power Company (238), and knew at the time that answering defendant, Hahn, and interveners Towle, Jake M. Shank and

Plummer & Scull were trying to establish a preference right, as afterwards ordered and decreed by the court, and at the time the court took the same under advisement, and on November 17, 1915 handed down an opinion, sustaining the contentions of answering defendant, Hahn, and interveners Towle, Shank, Plummer & Scull (177 to 187 inclusive). Afterwards it was stipulated that the property might all be sold at one and the same time (187-188), and thereafter stipulated that the property not covered by said mortgage and to be placed in the fund (sometimes called the "Unsecured Creditors' Fund"), was of the value of \$45,000.00 (211). Thereafter, the sale of said property was duly confirmed (215), and the claims of the answering defendants and interveners entered paid (242).

The American Water Works Company at this late date undertakes to intervene (269) into a purse of \$45,000.00 with a claim of \$1,268,434.66; the petition of the intervener comes too late.

ARGUMENT

The Revised Statutes of Idaho provide:

"Sec. 4111: Any person may before the trial, intervene in an action or proceedings, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both * * * by leave of court. The intervention must be before the trial."

The complaint in intervention filed after the joinder of issue on demurrer and submission of the cause thereby is too late.

People vs. Green, 1st Ida., 235, l. c. 238.
Hocker vs. Kelley, 14 Cal., 164.

Rockwell vs. Coffey, 20 Colo., 400.

Gale vs. Frasier, 4 Dak., 206.

Smith vs. Gale, 144 U. S., 520.

The right to intervene is a question of sound discretion of the court.

Smith vs. Gale, 144 U. S., 520.

The discretion of the chancellor in refusing to allow intervention in a suit will not be reviewed by the appellate court.

Gunnerson vs. Illinois Trust Company, 100 Ill. App., 401; affirmed 199 Ill., 422.

The appellant, American Water Works and Electric Company, a corporation, a proposed intervenor, is not injured by any action taken by the answering defendants and intervenors in the foreclosure suit. For example: If the answering defendant, Hahn, and intervenors, Shank, Towle, Plummer and Scull, had not intervened, all the proceeds of the \$45,000.00 of personal property would have gone to the Equitable Trust Company in satisfaction of its mortgage indebtedness. The appellant, American Water Works and Electric Company, will receive the same amount out of the funds in the hands of the receiver, and the claims against the receivership of answering defendant Hahn and intervenors will be reduced in that amount. Therefore, the appellant is not injured by the action of the District Court in allowing the claims of the answering defendant, Hahn, and intervenors have a priority of certain property of the Great Shoshone & Twin Falls Water Power Company (306).

It follows that the appellant, American Water Works

& Electric Company, is not injured by any actions taken by the answering defendant Hahn, and other interveners. and its application for intervention comes too late. The action of the District Court should be affirmed.

Respectfully submitted,

JAMES H. WISE,

Solicitor for Appellee, C. J. Hahn, Administrator of the Estate of Harry M. King, deceased.

Residence and Office, Twin Falls, Idaho.

